equipment to minimize negative impacts on natural and scenic resources.

FCC Allocation

5. In 1985, the Federal Communications Commission (FCC) created an allocation for a new FM radio station to serve the Town of Walpole, New Hampshire.

6. The FM signal that would be transmitted has been allocated by the FCC for a certain area. The specific area is characterized by the FCC as the "Area to Locate." To meet the FCC requirements, and to increase the probability of receiving an FCC license, the signal strength must be sufficient to reach a stated percentage of the residents of Walpole, New Hampshire. The FM frequency which would serve this allocation area is 96.3 MHZ and its maximum power level would be 1.9 kilowatts, DA max.

7. The FCC regulates the allocation and siting of FM radio transmitters and is the sole entity with the legal authority to allocate bandwidth for FM transmission. In addition to authorizing FM channels, the FCC has the related, but distinct, authority to grant construction permits for FM/telecommunications towers, and also the plenary authority to grant an FCC license.

8. Once an FCC allocation has been made for an FM station, the next step in the process at the FCC is that anyone who wishes to construct a communications facility with the intent of disseminating a signal on the allocated channel to reach the area to serve may file an application for a construction permit provided that the proposed facility or tower is within the Area to Locate.

Applicant Savoie's FCC Construction Permit

9. Mr. Savoie communicated to the FCC his intent to establish an FM radio station in the Walpole, New Hampshire area. Specifically, Mr. Savoie applied for a construction permit for a 180 foot tower on Bemis Hill that he claims would serve a sufficient percentage of the residents of Walpole to warrant the issuance of an FCC license.

10. On May 6, 1993, the FCC granted Mr. Savoie a construction permit that requires his facility to serve the Town of Walpole, New Hampshire. Among other requirements, the signal from the transmission facility must meet

certain separation and contour protection requirements to ensure that the signals of other radio stations are protected.

11. Although the FCC construction permit does not specify the exact location for the proposed transmission facility, it does specify a designated Area to Locate.

12. The Area to Locate within which Mr. Savoie seeks to operate the proposed FM radio transmission facility is graphically depicted in Exhibit GS-12. GS-12 depicts an Area to Locate for the FM allocation of frequency 96.3 MHZ (colored in blue) and a "grandfathered" allocation of Channel 242 permitted under Mr. Savoie's FCC construction permit (colored in yellow).

13. These areas to locate include all or a portion of the following Vermont towns: Grafton, Windham, Rockingham, Athens, and Westminster. The Area to Locate also includes Walpole, New Hampshire and a portion of its surrounding lands.

14. In his testimony, Mr. Savoie frequently refers to his "FCC license" when he intends to discuss either the FCC construction permit or alternatively, the FCC allocation. Without venturing into the legal implications of securing an FCC construction permit as compared with an FCC license, as a factual matter, the two authorizations are distinct and the terms are not interchangeable.

15. The specifications of the proposed transmission facility which Mr. Savoie submitted in his FCC Construction Permit application depicted a 180 foot tower that was designed to provide FM radio service within the Walpole, New Hampshire area to serve.

16. Without seeking an amendment to the FCC Construction Permit, Mr. Savoie determined that the proposed tower would only need to be 110 feet high.

17. In the District Commission proceeding, and in the present appeal, the application materials depict a 110 foot tower. From most vantage points a 110 foot tower is less visible than a 180 foot tower.

18. Mr. Savoie has not secured an independent FCC construction permit to build a 110 foot tower nor has he received a permit amendment authorizing the change from a 180 foot tower to a 110 foot tower.

19. In order to obtain an FCC construction permit for the tower that he actually proposes to construct, Mr. Savoie would be required to file a Form 301 application requesting that his construction permit be modified to change the antenna height, the height of the center of radiation, the Effective Radiated Power ("ERP"), and any other pertinent data associated with a lowering of the authorized antenna height.

Coverage

20. The concept of "coverage" pertains to a transmission facility's capacity to disseminate a signal of a sufficient strength (70 decibels as measured on the dBu scale) to a designated proportion of the target audience within the area to serve.

21. The measurement of requisite signal strength is set forth in the FCC regulations as a "principal community coverage requirement." Specifically, FCC Rule 73.315(a) states that an FM station must place a signal of 70 dBu or greater "over the entire principal community to be served." However, in practice the FCC requires that an applicant for an FCC license demonstrate only "substantial compliance with the principal community coverage requirement."

22. Substantial compliance means the provision of a 70 dBu signal over at least 80% of the residential area for the target site. The residents of Walpole, New Hampshire are the targeted recipients of the proposed WLPL FM signal.

23. As an engineering proposition, it is questionable whether the diminution in tower size from 180 feet to 110 feet could still transmit of a signal of requisite strength to cover the Town of Walpole in a manner that would comply with the FCC's "coverage" requirements.

24. The broadcast of an FM signal from a 110 foot tower on the Bemis Hill site, transmitting at an ERP of 2,150 watts would effect coverage of 681 residents of Walpole, New Hampshire, or 21 percent of its population.

25. The projected coverage from the proposed tower site falls far short of "substantial compliance with the principal community coverage requirement" required by FCC regulations. Thus, FCC approval of the proposed Project, if constructed, would be unlikely without substantial project modifications or at the very least a considerable increase in the proposed Project's ERP.

26. Coverage is a function of a multitude of variables including the height of the transmission facility, the ERP, the topography of the landscape intervening between transmission facility and target audience, and, to some degree, the presence of other radio signals (i.e. interference).

27. At the time of Mr. Savoie's construction permit application, the FCC was using antiquated coverage prediction formulas that did not adequately account for terrain blockage near the transmitter site.

28. A 110 foot tower on the Bemis Hill site would not provide a direct line-of-sight path to the area to serve in and around Walpole, New Hampshire. A direct path is not absolutely necessary, but it is highly desirable. Appellants' Exhibit AM4 in its depiction of the Bemis Hill Site (Site 5) graphically demonstrates that a ridgeline impedes the signal for a considerable distance from kilometer 3.5 through kilometer 8 (from the proposed facility to the target - depicted from left to right on the figure's *x* axis).

29. FM radio waves do not curve around obstacles very well. Intervening topographic features do not eliminate a signal's strength, but weaken it considerably by deflecting it. The consequence is that signal strength is affected by significant shadowing and multipath distortion.

30. A computer modeling technique known as the Okumura Terrain-loss Model more accurately approximates the coverage that would be effected by a given signal to a specified site, after accounting for terrain loss. This model is used widely by cellular, paging and other telecommunications services to more realistically predict their coverage area for site planning purposes.

31. The use of the Okumura terrain-loss Model, or some other alternative which accurately predicts signal coverage, is permitted under FCC Rule 73.313(e).

32. Based on the Okumura terrain-loss model, no signal equal to, or exceeding, 70 dBu will reach the area to serve from an FM transmitter located on Bemis Hill.

33. Other existing facilities closer to the target population of Walpole, New Hampshire, even if significantly shorter than the proposed tower, and even if operated at a substantially lower ERP, could effect coverage of up to 88 percent of the Walpole population.

34. The following alternative sites, all of which were identified by the Appellants, would effect the percentage of coverage noted in the table. The table also notes the ERP and tower height necessary to effect such coverage:

Site of Existing Facility	*Mt. Kilburn (Site 1)*	*Oak Hill-Fire Dept., Bellows Falls (Site 2)*	*Oak Hill-NEPS N. Westminster (Site 3)*	*VT EMS. GRAS, (Site 4)*
Transmitter Elevation	330m/ 1083 ft.	250m/ 820 ft.	240m/ 787 ft.	160m/ 525 ft.
Tower Height	10 m/32.8 ft.	10m/32.8 ft.	10m/32.8 ft.	10m/32.8 ft.
Distance from Walpole	5.85 km/ 3.16 miles	6.06 km/ 3.27 miles	5.38km/ 2.90 miles	5.13 km/ 2.77 miles
Coverage	88	69	81	79
ERP	575 watts	900 watts	975 watts	3000 watts

All coverage estimates depict a percentage of the population of Walpole, New Hampshire.

35. The technical specifications for the above-noted alternative sites were prepared by and submitted by the Appellants. The Applicants did not demonstrate that any similar technical feasibility assessments of alternate sites had been prepared.

36. Each of the sites depicted in the above table are technically feasible alternatives to the Bemis Hill site.

37. There are other existing facilities within the Area to Locate besides those identified in the above table. However, there is no evidence involving assessments of either predicted coverage or technical feasibility with respect to those additional sites.

38. The proposed tower would consist of the following:

    a. A ROHN 65g tubular tower with three sets of guy wires.
    b. Tower attachments including:
        i. one FM broadcast array antenna;
        ii. one paraflector;
        iii. two remote pickup units (RPUS).

39. Appurtenant to the tower would be the following:

    a. A 15' by 30' ROHN prefabricated equipment shelter;
    b. An emergency generator;
    c. An access trail;
    d. A private power line.

Project Tract

40. The location in which the Applicants seek to erect the proposed tower is a parcel of forested land amidst a relatively contiguous deciduous/hemlock/spruce forest. While not a pristine wilderness, the proposed tower location is largely undisturbed by human-made structures.

41. The ridgeline that includes Bemis Hill is unobstructed by human-made structures. Presently, no structure protrudes above the tops of the trees which comprise the mountaintop ridgeline that is visible from a distance. The result is an apparently undisturbed forested landscape.

42. The proposed tower would be situated on a forested hillside. The physical impact of constructing the proposed tower would only minimally disturb the trees, soil, and terrain below the tower.

43. Access to the proposed tower site would be via Ober Hill Road, a Class IV road. A section of existing logging/pasture trail would be improved for construction access.

44. The proposed tower would be accessible by snowmobiles or all-terrain vehicles on a year-round basis.

45. The proposed tower would extend approximately 60 feet above the tops of the trees which are presently standing. During periods of partial to full foliage cover, the remaining 50 feet would be obscured by leaves and/or woody vegetation. However, during the seasons in which the deciduous trees surrounding the site were without leaf cover, the lower sections of the tower might also be visible.

46. The width of that portion of the tower which would protrude above the trees would be 26.25 inches. The tower is constructed using an equilateral triangle design and would, therefore, appear equally wide from one vantage point as any other.

47. Federal Aviation Administration (FAA) regulations require towers greater than 200 feet in height to be illuminated by beacon lights. Because the proposed tower would only be 110 feet high, the tower would not require beacon lighting, and therefore, would not be visible on most nights.

Transmitter Specifications / Applicants' Needs

48. The unobstructed mounting area needed to accommodate the proposed transmission facility is 27 feet (lateral space). In addition, the transmitter would need approximately 7 feet above and below the antenna array.

Alternatives

49. Depending on structural stability and several other factors including windload and the type of existing guy wires (e.g. steel or fiberglass), an existing facility (including, but not limited to, those identified in the table at Finding of Fact 34) may need to be reconfigured or perhaps substantially redesigned to accommodate the Applicants' technical requirements.

50. Accommodation of new FM signal transmitters on existing facilities does not necessarily pose an obstacle to the continued functioning of those existing telecommunications or radio broadcast apparatus.

51. There are a number of existing facilities within the Area to Locate which could adequately host the WLPL proposed transmitter. Some of these may require significant modifications while others only slight adjustments.

Identification of Existing Facilities by the Appellants

52. In order to ascertain the physical locations of these towers, and hence, enable the study of their suitability for collocation, Applicant Savoie conducted a survey of an on-line database known as "Dataworld." This database maintains a data base of all FCC and FAA registered towers requiring clearance. Such database can be searched for a specified Area to Locate.

53. Dataworld lists only those towers greater than 200 feet in height - those which require blinking aviation lights. Most residents of Windham County would already be familiar with these sites and therefore, even one without an extensive background in tower siting issues would comprehend that a survey of the Dataworld listing would reveal no additional towers.

54. Mr. Savoie conducted a physical inventory. He contacted local power companies, put up notices at local stores, searched land records, and drove around many roads that traverse the Area to Locate. This search, purportedly consisting of approximately 200 hours, was not focused upon the most reliable indicators of existing facilities.

55. For the past eight or nine months, the FCC has maintained a master list of licensed tower sites on the Internet. Mr. Savoie did not review this compilation of towers.

56. There are approximately fifteen FCC licensed facilities in the region.

Applicants' Search for Existing Facilities and Effort to Collocate

57. Mr. Savoie did not develop a site specific plan or engineering analysis to determine what design changes may be needed to accommodate WLPL on Mount Kilburn or any other location that was identified by the Appellants.

58. Subsequent to the Board's decision denying the permit application, Mr. Savoie contacted the operator of the Mount Kilburn site. In a letter dated November 7, 1995, Mr. Savoie laid out the technical specifications that would be required for collocation of the WLPL transmitter on the Mount Kilburn/Fall Mountain Site and requested that he be permitted to locate his FM transmission facility there.

59. The Mount Kilburn site is operated by Warner Cable ("Mount Kilburn Tower"). On November 27, 1995, Terry Gould, Time Warner Cable's General Manager, responded to Mr. Savoie's request. General Manager Gould noted that Warner Cable would be unable to meet Mr. Savoie's request for forty one feet of unobstructed tower space, and could not convert from its steel guying cables to fiberglass.

60. There is no evidence of a counter-proposal or a modified request to locate on the Mount Kilburn tower. There is also no evidence of the submission of similar requests to locate the WLPL transmitter on any other existing facilities prior to the application for reconsideration with the District Commission.

61. The Applicants submitted their application for reconsideration with the District #2 Environmental Commission on January 9, 1996.

62. The deadline for the filing of prefiled direct testimony in this matter was on Tuesday, February 18, 1997.

63. Within the period extending from the date of the Board's initial Decision until the deadline for the filing of prefiled testimony in the present appeal, Applicants submitted only two documents that demonstrated an attempt to collocate on an existing facility within the Area to Locate. Both pertain to the Mount Kilburn tower.

    a. Exhibit GS-13 is a letter dated November 7, 1995 in which Co-Applicant Savoie contacted Terry Gould, the General Manager for Warner Cable, which operates the Mount Kilburn/Fall Mountain Tower. The letter sets forth the technical requirements for the proposed WLPL FM transmitter. It makes no reference to any

specific design modifications that the Applicants propose to ensure compatibility with the existing facility, except that Applicants note that in order to accommodate the added windload, fiberglass guy wires would probably need to replace steel guys. Applicants note that such a change may not be possible due to previous structural modification.

b. Exhibit GS-14 is a letter dated November 27, 1995 in which Terry Gould of Warner Cable responds to Co-Applicant Savoie's November 7, 1995 request by declining to accept it on the basis that the additional weight and loading factors are unacceptable.

64. From a purely technological standpoint, the Mount Kilburn site is superior to the Bemis Hill site because of its greater capacity to effect coverage over more than 80 percent of the Walpole population. Moreover, because of its proximity to Walpole, it could effect such coverage at a relatively low ERP.

65. For similar reasons, the sites identified as sites 2, 3, and 4 in Finding of Fact 34, would also be superior to Bemis Hill from a technological standpoint, although each of these towers might need to be modified somewhat to accommodate the proposed FM transmission facility.

66. Applicants submitted another letter that was sent to Mr. Gould of Warner Cable via facsimile on February 3, 1997 requesting to collocate on the Mount Kilburn tower. This letter is nearly an exact duplicate of the letter sent on November 7, 1995; consequently this letter did not provide additional information or either technical or financial incentives to Warner Cable in conjunction with the collocation request. The request was again denied.

67. Despite Mount Kilburn's superior position in relation to the area to serve, the Mount Kilburn site, after minimal negotiation between Mr. Savoie and the tower operators, was not made available to Applicants for broadcasting.

68. Applicants did not contact representatives of the 3 other sites recommended by the Appellants until after receiving general information and technical studies of those sites that were prepared by Appellants' consultants in the prefiled testimony.

69. In late February, 1997, Applicant Savoie contacted three existing facility owners or operators via letter. Those letters, referred to collectively as "Collocation Requests" are more specifically described below.

70. On February 24, 1997, Mr. Savoie contacted Chief Bill Weston of the Bellows Falls Fire Department via letter regarding the potential use of tower space on the Police/Fire Tower on Griswold Drive in Bellows Falls ("Bellows Falls Tower").

71. Also on February 24, 1997, Mr. Savoie contacted Rose Fouler of the Greater Rockingham Area Services via letter regarding the potential use of tower space on the tower at Health Care Services, Bellows Falls ("GRAS Tower").

72. On February 27, 1997, Mr. Savoie contacted Steve Stitter of the New England Power Services, Co. ("NEPS") via letter regarding the potential use of tower space on the NEPS tower on Oak Hill ("Oak Hill Tower").

73. Each of the three letters cited above contained a paragraph through which Applicant Savoie requested that any subsequent agreement be governed by an indemnification clause, a hold harmless clause, and a quiet enjoyment clause. The text of that paragraph follows:

> Consequently, if you are to agree to this proposal, I shall require an indemnification clause and a hold harmless clause in any agreement we should reach, as well as a quiet enjoyment clause. The site is worthless to me, if after I turn on the site, I am forced by the landlord to vacate from interference complaints.

74. The Bellows Falls Fire Department's radio technician reviewed Mr. Savoie's February 24, 1997 request to collocate. The Fire Department denied the collocation request, in part, because of a caution that had been identified with respect to the potential interference the FM transmitter may have caused to the existing transmission and receiving apparatus.

75. The Bellows Falls Fire Department's denial of the Applicants' collocation request was also premised, in part, on the uncertainty regarding the type and

extent of any renovation that might be required to accommodate the WLPL transmitter.

76. The Fire Department's concern over potential interference was exacerbated by the clause referred to Finding of Fact # 73.

77. The reply letter pertaining to the Bellows Falls Tower states that "the most absurd part of [Savoie's] proposal is asking the town for an indemnification and hold harmless."

78. Even if acceptable in all other respects, Applicant Savoie's insistence on the indemnification clause referred to in Finding of Fact #73 in each of the Collocation Requests rendered his offer unreasonable and predisposed the result - i.e. it solicited a denial.

79. On March 5, 1997, Steven Stitter, NEPS Senior Engineer sent a letter rejecting Mr. Savoie's request in part because they could not accept interference and "would be unwilling to assume the full risk should interference occur, as you have requested."

80. On March 26, 1997, GRAS replied to Mr. Savoie noting that they had carefully deliberated with respect to the tower request, and that they were concerned about interference and were, therefore, not interested in leasing space to Mr. Savoie.

81. Prefiled rebuttal testimony was due on March 11, 1997. None of the letters requesting tower space or rejecting the requests were submitted prior to the evidentiary hearing.

82. No evidence was submitted that documented any attempts by Applicant Savoie to follow-up on the Collocation Requests, nor had any documents been sent to existing facility owners with technical explanations regarding mitigation of impacts, offers to replace guy wires, increase tower height, etc.

83. No letters, counter-offers, or further negotiations subsequent to Applicant Savoie's receipt of the reply letters from representatives of Bellows Falls,

New England Power Services, and the Greater Rockingham Area Services denying permission to collocate were presented as evidence.

V. CONCLUSIONS OF LAW

A. Scope of Appeal

The only provision of 10 V.S.A. §6086(a) under appeal is Criterion 10. As the Board noted in the October 11, 1995 Decision denying the application, neither Athens nor Rockingham has adopted a town plan or capital program, therefore, the only facet of Criterion 10 that is presently under scrutiny is whether the proposed Project conforms with the Regional Plan. Pursuant to the Prehearing Conference Report and Order issued on January 9, 1997, the scope of the Board's review is further limited to assessing whether the proposed Project conforms with three specific policies within the Regional Plan, Policies 2, 4 and 5, each relating to the appropriate siting of communications towers. While there is some inter-relationship between the present review and that which may be conducted by the FCC, neither the FCC allocation nor the issuance of an FCC construction permit preempts the State's authority to ensure that the proposed tower meets applicable state and local land use regulations. See 47 U.S.C. §151 et seq.

B. Regional Plans as Regulatory Documents in Act 250

Act 250 is a statutory scheme intended to protect and conserve the lands and the environment of the state and to insure that these lands are devoted to uses which are not detrimental to the public welfare and interest. Findings and Declaration of Intent; Act No. 250 §1 (1969 Adj. Sess.). The applicable provisions of 24 V.S.A. §§ 4301-4495, pertaining to municipal and regional plans, are a mechanism through which the intentions of localities and defined regions of the State are entered into the calculus of determining which uses of the land are appropriate - i.e. which are in the public welfare and interest. Zoning bylaws are one means by which these intentions are given regulatory effect, adoption of a regional plan by a municipality pursuant to 24 V.S.A. § 4349 is another. In this case, the applicable policies of the Regional Plan are given regulatory effect in the Act 250 context by virtue of 10 V.S.A. §6086(a)(10). Should there be any ambiguity concerning the application of either statute to the particular set of facts presented here, the over-arching purpose of the statutory scheme regulating land use must prevail. In re Preseault, 130 Vt. 343, 346 (1972) citing Reed v. Allen, 121 Vt. 202, 207 (1959) (Statutes *in pari materia* are to be construed with reference to each other as parts of one system).

The Vermont Legislature has emphasized that the provisions of a duly adopted regional plan are not merely guidance documents or vague descriptions of regional planning goals. Rather, the Legislature at 24 V.S.A. §4348(h) specifically affirms the applicability of those provisions of a duly adopted regional plan which are relevant to the determination of any issue in proceedings under 10 V.S.A. Chapter 151 - Act 250.[2]

C. Applicable Policies

Specific language of a regional plan setting forth mandatory prohibitions is sufficient to support the denial of a permit application if the Board can not make affirmative findings under criterion 10 with respect to those provisions. See In re Green Peak Estates, 154 Vt. 363, 368-70 (1990). Thus, where a developer proposed the creation of a residential subdivision in Dorset on slopes greater than twenty percent, the Supreme Court affirmed the denial of an Act 250 permit, citing the proposed development's failure to conform to a specific policy of the Bennington County Regional Plan that prohibited residential development on slopes greater than twenty percent. Re: Green Peak Estates, Findings of Fact, Conclusions of Law and Order, Application #8B0314-2-EB, July 22, 1986, aff'd In re Green Peak Estates, 154 Vt. 363 (1990); see also In re MBL Associates, Docket No. 96-110, Entry Order, March 6, 1997; but Cf. In re Frank A. Molgano, Jr., 163 Vt. 25 (1994) (where the regional plan is ambiguous rather than specific).

The relevant policies of the Regional Plan, all of which pertain to the proper siting of communications facilities, follow:

2. Encourage expansion of communications at existing transmission and receiving stations if such expansion is in the best public interest.

4. Discourage the development of new sites for transmission and receiving stations in favor of utilizing existing facilities.

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2 In a letter of opinion written in 1970, the Attorney General indicated that, insofar as Act 250 is concerned, regional plans . . . "have achieved the role and status of law in and of themselves, something far beyond their intended purpose under 24 V.S.A. Chapter 91 [now Chapter 117]." The Attorney General made it clear that the above statement was not intended as a formal legal opinion; nonetheless, it is an instructive insight. Atty. Gen. Op. No. 609, p. 162 (1970) (emphasis in original) cited in Re: Pyramid Company of Burlington, Application #4C0281, Findings of Fact, Conclusions of Law and Order, October 12, 1978.

5. Strongly encourage the siting and design of satellite dishes, radio towers, antennae and other transmission and receiving equipment to minimize negative impacts on natural and scenic resources.

The Applicants have argued and the Board has concluded that each of the above three policies constitutes a specific policy. See Re: Gary Savoie, d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 11, 1995). Having made this determination, the Board can confidently embark on an analysis of whether the proposed Project conforms with each of these policies. Where the policies of a regional plan are specific by their own terms and without reference to any other document or regional plan provision, they are to be given the effect intended and should be evaluated in view of the document's overall purpose. See In re Judy Ann's Inc. d/b/a The Loco-Motion, 143 Vt. 228 at 231(1983); In re Village of Waterbury Water Commissioners, Declaratory Ruling # 227 at 12 (February 5, 1991).

Broadly stated, the purpose of the applicable provisions of the Regional Plan is to mitigate, or if possible eliminate, the negative visual impacts caused by certain telecommunications facilities. Such facilities, when they protrude above the ridgeline, are not only visible but incongruous with the scenic qualities associated with Vermont's mountain ridges. This Board has continually noted the importance of protecting the visual continuity of Vermont's prominent mountaintop ridgelines. See Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB. Findings of Fact. Conclusions of Law and Order at 18-19 (Jan. 13, 1986).

D. Burden of Proof

Pursuant to 10 V.S.A. §6088(a) the Applicants generally have the burden of proof under Criterion 10. In the context of this appeal of the Reconsideration Decision, the general rule remains binding upon the Applicants, subject to one modification. In this instance, as noted in the discussion *supra* at page 4, the Board extends a presumption of validity regarding the District Commission's findings with respect to Policy 5 of the Regional Plan. Re: Sherman Hollow, Inc. et al., Application #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 18 (June 19, 1992).

The Board in its Decision denying the Applicants' permit request, found that the Applicants had met their burden with respect to Criterion 8, finding that the Project, as

proposed, would not result in an undue adverse impact upon scenic values, and that it would not have an undue adverse effect upon unique natural areas or necessary wildlife habitat. Given the similarity between the Board's Criterion 8 standard and the Regional Plan's Policy 5 standard, the Board extended its reasoning and its conclusions to find that the Project, as proposed on the Bemis Hill site, would comply with Policy 5.

Applicants argued at the prehearing conference that on the basis of the Board's, and subsequently the Commission's, findings with respect to Policy 5, conformance therewith need not be determined again. However, because of the relationship between Policies 2 and 4 and Policy 5, and because in the event that reasonable alternative sites were identified, a *relative* analysis of the proposed Project's impacts upon scenic values might be necessary, the Board nevertheless determined in its Prehearing Order that Policy 5 was still appropriately within the Board's scope of review. Even though Policy 5 is still within the scope of review, the Applicants are entitled to a presumption of validity relative to Policy 5. Therefore, Appellants have the burden of demonstrating non-conformance with Policy 5 by a preponderance of the evidence.

In the Decision, the Board concluded from an objective standpoint, and without reference to alternative sites, that the proposed tower would not constitute an undue adverse effect on aesthetics. In this case, if the Applicants were to have proven by a preponderance of the evidence that the Bemis Hill location was the only site within the Area to Locate from which an FM signal could be transmitted to Walpole, New Hampshire, then the Board would rely on its presumption of validity to affirm its conclusions under Policy 5. Moreover, because such a result would mean that there were *no* feasible alternative sites, Appellants could not demonstrate a less aesthetically-intrusive alternative. Likewise, assuming alternatives were identified after a search manifesting all due diligence, if the Applicants proved by a preponderance of the evidence that the owners or operators of all technically feasible existing facilities within the Area to Locate had denied the Applicant permission to collocate *after a good faith negotiation with each owner or operator*, then Applicants would satisfy Policies 2 and 4. Under this scenario, Appellants would again be hard-pressed to argue the practicability of a less intrusive alternative. Instead, based upon the Board's Decision and the presumption of validity with respect to Policy 5, the Board's prior conclusions regarding impacts to scenic resources would remain intact since the Board would not be able to weigh the relative visual impact of one site versus another because Applicants would have proven that no other alternative sites were available for collocation.

E. Compliance with Criterion 10 (Regional Plan)

Provisions of a Regional Plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction. In re MBL Associates, Docket No. 96-110, , Entry Order, March 6, 1997 at page 2 citing Houston v. Town of Waitsfield, 162 Vt. 476 (1994). The fundamental rule in the construction of statutes is to give effect to the intention of the legislature. Verrill v. Daley, 126 Vt. 441, 446 (1967); Reed v. Allen, 121 Vt. 202, 206 (1959). In this case, there can be no reasonable dispute over the clarity or ambiguity of the express language of the Regional Plan. The Regional Plan clearly sets forth a preference for the use of existing facilities in order to avoid constructing new ones. Thus, the Board need not embark on a lengthy analysis of the proper construction of the text of the Regional Plan.

The Board concludes that the collocation provisions of the Regional Plan furthered by Policies 2 and 4 are intended as mandatory requirements. Moreover, the unequivocal language of those Policies is not only clear on its face, but the principle of physical collocation that it embraces favors a strong public policy of maintaining the integrity of Vermont's scenic resources - specifically its mountaintops and contiguous ridgelines. To hold otherwise would render the collocation provision pure surplusage and would not further the broad goals of minimizing the negative impacts of commercial development that are the clear intent of Vermont's land use regulatory scheme. Trombley v. Bellows Falls Union High School, 160 Vt. 101, 104 (1993) quoting State v. Beattie, 157 Vt. 162, 165 (1991) (statutory provision not to be construed in a way that renders a significant part of it pure surplusage). Were collocation a matter that the Regional Planning Commission merely suggested, this Board's intrusion into the province of a commercial operators' business negotiations to effect collocation might overstep the bounds of the legislature's intent as expressed in 24 V.S.A. §4348(h). However, such is not the case here since Policies 2 and 4 are specific, mandatory requirements.

Before analyzing compliance with each of the three specific policies at issue, the Board must first consider the general principle espoused by Policies 2, 4 and 5 of the Regional Plan: one that is known as collocation.

Collocation

The principle of collocation is employed with respect to communications facilities in two inter-related, but distinct, contexts[3]. In this case, the Windham Regional Planning Commission has contemplated the need to minimize the number of telecommunications towers necessary to transmit legally authorized signals, whether those be FM or AM radio transmission, cellular telephone service, cable television, emergency broadcast signals or the like. It promotes this goal through Policy 4 of the Regional Plan which requires, where possible, physical collocation of transmission facilities. In the context of an Act 250 proceeding, this requirement imposes a burden upon an applicant to demonstrate to the district commission or to the Board, that there are no existing sites which are suitable to the applicants needs, and that if such facilities do exist, that they are either technically inadequate (even with significant modifications) or that the owner - after the process of a meaningful, good faith negotiation, conducted at arms' length - will not allow collocation.

While the widely-favored public policy goals of collocation are obvious, the more troublesome issue, from the standpoint of a regulatory Board, is analyzing, and in the end determining, the amount of zeal with which the operator of a private commercial enterprise who seeks to construct a new tower must affirmatively negotiate with the owner or operator of an existing communications facility to collocate on the existing tower. The issue is particularly problematic where, as in this instance, the Applicants could potentially recover a substantial economic benefit, independent of the operation of the FM transmission facility, if they are *unsuccessful* in collocating on an existing facility.[4]

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[3] One use of the collocation principal, not relevant in the instant case, relates to the sharing of "virtual space" necessary to transmit a multitude of signals through a single cable, or over a single frequency. The FCC and certain states have required telephone companies to lease space inside (or alternatively provide interconnection facilities just outside) their local switching offices to accommodate the placement of competitors' telecommunications equipment. *See for example*, Larsen, Alexander C. and Mudd, Douglas R. "Collocation and Telecommunications Policy: A Fostering of Competition on the Merits?" in 28 Cal. W. L. Rev. 263-313 (1992). The objective of such a policy is not to provide aesthetic enhancements or prudent land use management; rather, it is a mechanism to spur competition amongst the various telecommunications providers. Arguably, absent the imposition of a legally binding collocation requirement, or effective market-based incentives to favor collocation, the owner and operator of the physical cable or transmission line, would enjoy a natural monopoly, thereby excluding competition and preserving the potential to gouge ratepayers.

[4] The additional economic benefit that can reasonably be foreseen is that benefit which would accrue to a new tower operator as a "tower landlord." This underscores the economically rational "avoidance" of collocating, since the privilege of construction, once bestowed, also ensures that all future applicants must seek to locate on the then-existing tower.

After an exhaustive search for guiding precedent, the Board has been unable to find an analogous framework for effectively implementing a collocation policy. The following discussion, therefore, provides background for the Board's enunciation of a standard relating to the implementation of a specifically articulated collocation policy such as the one set forth in Policies 2 and 4. The Board concludes that in order to carry out the intent of both 24 V.S.A. §4348(h) and the collocation provision of the Regional Plan, and to ensure compliance with Criterion 10 of Act 250, the Board must probe into the negotiations between the Applicants and each of the existing tower owners within the Area to Locate.

Because the effectiveness of the collocation policy is, in part, contingent upon the granting of permission by existing facility owners and operators to "newcomers" to a particular market, the collocation provision of Policies 2 and 4 is one that implicates not only the rights and obligations of the permit applicant, but also the tower operators who, in this instance, manage the "existing facilities" within the Area to Locate. These individuals enjoy certain property rights in their communications facilities that are potentially affected by their allowing collocation to occur.[5]

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Property rights in the context of telecommunications facilities have been determined by the U.S. Supreme Court to consist of three rights associated with the ownership of property: the power to possess, the power to use, and the power to dispose. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). Loretto involved a New York law that required a landlord to permit a cable company to install cable equipment on his building. The U.S. Supreme Court discussed the implications of such a requirement on each of the rights associated with the landlord's ownership of the building. Although the following discussion pertains to the constitutional issue of a taking, a matter beyond the jurisdiction of the Board and not relevant to this case, the discussion provides a meaningful context for determining the relatively slight regulatory burden imposed upon both tower facility landlords and those asked to collocate on their existing structures in the Regional Plan policies under scrutiny.

If government action constitutes a permanent physical occupation of property, there is a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Loretto at 434-35. In determining whether the New York law at issue in Loretto constituted a physical taking, the Court analyzed the following issues: (1) whether the government authorized action deprived the owner of both his right to possess the occupied area and his right to exclude the occupier from possession and use of it; (2) whether the government action forever denied the owner any power to control the use of the property such that he can make no non-possessory use of it; and (3) whether the government action generally leaves the owner with only "the bare legal right to dispose of the occupied space." Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) discussing Loretto. The Loretto Court went on to add that *absolute* exclusivity of the occupation, and *absolute* deprivation of the owner's right to use and exclude others from the property were hallmarks of a physical taking. The Southview case strongly validates the Board's authority to engage in regulatory review that protects aesthetic values as well as such unique and irreplaceable resources as wildlife habitat and recreational opportunities derived from the preservation of the landscape. The rationale of the Second Circuit Court of Appeals supports such

Policies 2 and 4 of the Regional Plan

In the present case, the Windham Regional Plan's collocation principle, as espoused in Policies 2 and 4 only slightly impinges upon the property rights of existing facility owners, if at all. Indeed, because Policy 4 discourages creation of new communications sites, it creates a potential source of revenue to existing tower owners. The operator of an existing facility is not compelled to allow any operator to collocate upon the existing facility. Within the considerably broad parameters of technical feasibility, existing facility operators are encouraged to expand their facilities to accommodate new proposed transmission and receiving facilities. As noted above, Policies 2 and 4 do not compel owners and operators of existing facilities to lease to new licensees. Rather, by applying to new applicants such as Applicant Savoie, Policies 2 and 4 stimulate market transactions that will promote efficient use of telecommunications resources and at the same time minimize the impacts of new telecommunications structures upon the sensitive aesthetic values associated with mountain ridges. We conclude that the collocation requirements of the Regional Plan are specific and mandatory policies furthering broad public policy goals that seek to balance the benefits of a more sophisticated telecommunications infrastructure with the need to preserve the aesthetic and recreational values of the region. Both are essential to the growth of the State's economy. The Board concludes that Policies 2 and 4 impose affirmative obligations upon an applicant for a new telecommunications facility.

Public Policy Rationales for Telecommunication Facility Collocation

Collocation if executed properly will greatly mitigate the environmental impacts associated with the rapidly developing sector of the economy involving telecommunications, wireless services, and broadcasting. The Board acknowledges that the benefits of a highly developed communications infrastructure are essential to economic growth within the state. The Board concludes, however, that given the Applicants' almost singular focus on the Bemis Hill site, they have not paid adequate regard to the Regional Plan's admonition

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regulations even where the statutory scheme under scrutiny tends to impose affirmative obligations upon an applicant.

In a similar case involving a challenge to the Pole Attachments Act, 47 U.S.C. §224 (1988) (authorizing FCC to regulate rates utility companies can charge cable television operators who lease utility company poles to carry their television cables) the U.S. Supreme Court affirmed the narrow scope of physical takings review, holding that where the utility invited the cable company to lease space on its poles there had been no physical taking, even where the effect of the FCC regulation was a substantial reduction in rent received by lessor. FCC v. Florida Power Corp., 480 U.S. 245 (1987).

discouraging the development of new sites for transmission and receiving stations in favor of utilizing existing facilities. Leaving aside the question of whether Bemis Hill is a technically feasible site for the transmission of an FM station to Walpole, New Hampshire, the Board concludes that the Applicants have not fulfilled their obligation to explore opportunities to locate the FM transmitter on an existing facility.

The Test for Compliance

No court or administrative agency within Vermont has yet interpreted the requirements imposed by a telecommunications collocation policy. As a touchstone for its determination of compliance with Policies 2 and 4 of the Regional Plan, the Board will use a two-part test. First, the Board will determine whether the Applicants exercised due diligence in seeking to identify existing towers within the Area to Locate that could be pursued as reasonable alternatives. Next, assuming that any additional site is identified, and guided by several principles of the law of commercial transactions, the Board will determine whether the Applicants' attempt at collocation was conducted in good faith, as an arms-length transaction.

The Search For Existing Facilities Must be Made with Due Diligence

The discharge of Applicants' burden to locate on an existing facility must follow a search that is conducted with all due diligence to ascertain any available alternatives. The Board is not compelling the Applicants to construct the proposed FM transmission facility at a site other than Bemis Hill. Indeed, the Board acknowledges that it has no authority to do so under Policies 2 and 4. Rather, the Board is requiring that all available alternatives to the Bemis Hill location be meaningfully explored. The first step in that process is to identify all existing facilities. In this case, Applicant Savoie conducted what he claims to have been an exhaustive physical search of the region. In the prior proceedings, only the Mount Kilburn site was identified as a possible alternative. In order to determine whether there were any other such alternatives, Applicant Savoie took the following actions: he drove many miles of back roads, he posted listings at general stores, he searched property records in town clerks' offices, and explored abandoned or infrequently-used utility line infrastructure. Applicant Savoie claims to have conducted roughly 200 hours worth of such searching. In addition, Applicant Savoie searched a federal database known as Dataworld. This database lists only those towers which exceed 200 feet in height and, therefore, any potential alternatives that may have appeared in this database would be obvious from even the most cursory physical inventory of the region.

Applicant Savoie identified no alternative sites in his prefiled testimony except Mount Kilburn. The number of hours one spends in pursuit of a desired goal is not necessarily a manifestation of due diligence. Rather, due diligence is determined by a look at the totality of circumstances. Applicant Savoie failed to use an FCC database that listed all FCC licensees within the region. Instead, he used the Dataworld database that he should reasonably have known would not generate the names and locations of any facilities with which he was not already familiar. In contrast, Appellants' search was a very narrow search of a more recent FCC database than Dataworld that is publicly accessible on the Internet. This more comprehensive FCC database turned up a number of sites within the Area to Locate. Searching this database enabled the Appellants to identified the three additional potential alternatives that were noted in the table set forth in Finding of Fact #34 ("the Alternatives").

Once existing facilities are identified, the next step toward finding reasonable alternatives is to perform at least a minimal analysis of technical feasibility. Appellants presented substantial evidence tending to show that any one of the Alternatives which they specifically analyzed could be modified to accommodate Applicants proposed transmission facility, and showed that, in sum, each site was a reasonable alternative to the Bemis Hill site. Appellants submitted their findings to the Board as prefiled direct testimony, and it was only by virtue of providing that testimony to Applicants that the Applicants then commenced negotiations with the owners and operators of the Alternatives.

The Board concludes that the Applicants did not exercise reasonable due diligence in their search for available alternatives to the Bemis Hill site. On this basis alone, the Board declines to find conformance with Criterion 10. However, because the Appellants have prompted the Applicants to explore three additional alternatives, the Board next turns to an analysis of the Applicants' attempt to collocate on each of those existing facilities.

Negotiating in Good Faith

Once all technically feasible alternatives are ascertained (in this case, largely with the assistance of the Appellants), a project applicant that is bound by the collocation provisions of the Regional Plan must conduct good faith negotiations with the owner or operator of each and every existing facility to collocate on one of those existing facilities. Only after both a search manifesting all due diligence to ascertain available alternative sites, and a good faith negotiation with the singular objective of successful collocation, will the Applicants have satisfied the burden that is assigned to them under Policies 2 and 4 of the Regional Plan.

The Applicants may not simply telegraph their desire to be unsuccessful in the negotiation. Rather, an applicant must aim to succeed in the negotiation to secure tower space.

Co-Applicant Savoie is a successful entrepreneur and businessperson and he has testified to his significant expertise in the field of telecommunications. The Board need not instruct such an Applicant regarding the particular manner in which a businessperson diligently pursues a contract negotiation. Applicants need not be reminded of the elements of a good faith attempt to locate WLPL's proposed transmission facility on any one of a number of sites within the Area to Locate that the Board concludes could be made technically capable of housing the WLPL FM transmitter.

The Applicants commenced their negotiations with each of the Alternatives, except the Mount Kilburn site, very late in the course of the appeal proceeding. Specifically, between the period after Applicants received the Appellants direct testimony, and the date of the hearing - a period of roughly two and one-half months. The circumstances attendant to the limited negotiations between Applicant Savoie and each of the existing facility owners and operators that were identified by the Appellants were clouded by a request that any contract between them include an indemnification and hold harmless clause. Vermont law permits such an indemnification clause in the context of a landlord-tenant relationship. See for example, Lamoille Grain Company, Inc. v. St. Johnsbury and Lamoille County Railroad, 135 Vt. 5 (1976); Washington Electric Co-op, Inc. v. Massachusetts Mun. Wholesale Electric Co., 894 F.Supp 777 (Dist.Vt. 1995). However, it is typically the landlord who seeks indemnity from a tenant owing to the landlord's superior property rights in the ownership of the leasehold and because it is typically the tenant, not the landlord, who has the greater control over the activities on the premises from which liability might arise. The reason for such a clause, from a commercial landlord's perspective, is to enable the landlord as owner of the property hosting other business enterprises, to protect his or her own interests in the following ways: (1) it exonerates the landlord from liability which might arise as a consequence of any tenant's tortious conduct; (2) it shields the landlord from paying damages that are ordered as a result of an actionable nuisance claim against one of the landlord's tenants by another; and (3) with respect to insurance coverage, where an insurance company defends on a claim for loss, and where a cause of the harm for which coverage is claimed extends from the actions of any tenant, such insurance company may attempt to implicate the assets of the landlord through a device such as impleader or interpleader. An indemnification clause in favor of the landlord as indemnitee can insulate the landlord from having to contribute to the payment of the claim for coverage.

In this case, a properly executed indemnification clause naming Mr. Savoie as indemnitee would shift any potential liability arising from Applicant Savoie's FM

transmission apparatus to the tower owner. On the basis of the documentation provided by the Applicants, Applicant Savoie has not provided any assurance to the recipients of the Collocation Requests that he would attempt to provide technical explanations regarding mitigation of impacts attributable to the WLPL transmission equipment. In effect, the tower landlord would become Applicant Savoie's silent business partner without corresponding compensation. See City of Burlington v. National Union Fire Insurance Co., 163 Vt. 124 (1994) citing Toombs NJ Inc. v. Aetna Casualty and Surety Co., 591 A.2d 304, 306 (Pa. Super. Ct. 1991). It is unreasonable to expect that an existing tower owner would concede to the indemnification clause based on the paucity of data regarding how Applicant Savoie could make his proposed transmission facility fit within the operating parameters of the existing transmission and receiving apparatus.

An agreement to the indemnification clause in the Collocation Requests by any of the owners or operators of the existing facilities that were identified would have amounted to a voluntary expansion of their own potential liability. Such an agreement in this case would needlessly impose great risk in the economic venture upon an existing facility owner without any prospects of sharing in the economic benefits which may accrue to Applicant Savoie's FM station. While an indemnification request as a component of an initial request to collocate may have been reasonable as an aggressive starting point for the negotiations, Applicant Savoie's decision not to follow up on the denial of the Collocation Requests support the Board's conclusion that these were "take it or leave it" offers that required the inclusion of an indemnification agreement naming Applicant Savoie as indemnitee and holding his operations harmless. Applicant Savoie's insistence upon the indemnification and hold harmless clauses, without significant financial enticement, predisposed the result of having his Collocation Request refused in each instance. Applicant Savoie compounded an unreasonable request for indemnification with a cursory, or at best, an incomplete description of the technical feasibility of collocating his equipment within the operating parameters of the existing transmission and receiving apparatus. The fact that Applicant Savoie was the one requesting to locate on the tower, and not vice-versa, renders the request to be held harmless even more unreasonable.

The tenor of Applicant Savoie's letters preordained the result of having his request denied in each instance. Applicant Savoie did not even attempt to identify any benefits, including economic benefits of leasing tower space to his station, he alluded to a tower that has been notoriously causing interference in the Town of Charlotte, he referred to a pending lawsuit against an FM transmission facility in White River Junction, he sought, unreasonably, indemnification from the tower owner, and he did not participate in any give-and-take that is typically associated with the negotiation of a contract between a vendor of commercial space and a potential tenant. Accordingly, the Board concludes that the Applicants failed to negotiate in good faith.

As explained above, the Board concludes that the Windham Regional Planning Commission made it abundantly clear, through the express language of the Regional Plan, that it sought to minimize the number of telecommunications towers within the region. It sought to do so not only by promoting the use of existing telecommunications facilities, but it also set forth a policy to *encourage the expansion* of these existing facilities. Moreover, the Regional Plan makes it clear that where towers are to be sited, they should be constructed with as little impact to valuable scenic resources as possible.

Without fulfilling their obligations to identify and assess all existing facilities and to negotiate in good faith with the owners of each of those facilities that were identified by the Appellants, the Applicants have undercut the meaning of the Regional Plan and have failed to demonstrate compliance with Criterion 10. Because the Board concludes that the Applicants have not met their burden of proving compliance with Criterion 10, it declines to reach the issue of whether the Appellants have met their burden with respect to Policy 5.